Supreme Court, U.S.
FILED
071491 MAY 27 2008
OFFICE OF THE CLERK

No. 08-

In the
SUPREME COURT OF THE UNITED STATES

LARRY CRAWFORD,
Director of the Missouri Department of Corrections,
CYNDI PRUDDEN,
Acting Superintendent Women's Eastern Reception, Diagnostic and Correctional Center,
in her official capacity,
Petitioner,

v.

JANE ROE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Jeremiah W. (JAY) NIXON
Attorney General of Missouri
JAMES R. LAYTON
State Solicitor
MICHAEL PRITCHETT
Counsel of Record
Assistant Attorney General
PO Box 899
Jefferson City, MO 65102
Phone: (573) 751-3321
Fax: (573) 751-9456
Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

Whether the policy of the Missouri Department of Corrections not to transport prisoners for nontherapeutic abortions, in furtherance of its interests in safety and efficient use of resources, as well as in support of the state policy in favor of childbirth, violates the Fourteenth Amendment?

Whether the right of an inmate to leave an assigned correctional institution for a nontherapeutic abortion is fundamentally inconsistent with her status as a prisoner?

PARTIES TO THE PROCEEDING

Larry Crawford, Director of the Missouri Department of Corrections, in his official capacity.

Cynthia Prudden, Acting Superintendent, Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity.

Jane Roe, individually and on behalf of all others similarly situated.

DISCLOSURE STATEMENT PER RULE 29.6

There is no parent corporation or public company related to the parties in this case.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

DISCLOSURE STATEMETN PER RULE 29.6 iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS THE WRIT SHOULD BE GRANTED 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Gerber v. Hickman, 291 F.3d 617, (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002).....6

Maher v. Roe, 432 U.S. 464 (1977).....3, 4

Roe v. Crawford, 439 F.Supp.2d 942 (W.D. Mo. 2006).....1

Roe v. Crawford, 514 F.3d 789 (8th Cir. 2008).....1

Turner v. Safley, 482 U.S. 78 (1987).....3

Other Authorities

U.S. CONST. amend. XIV, § 1.....1

28 U.S.C. § 1254.....1

Sup. Ct. R. 10.....3

PETITION FOR WRIT OF CERTIORARI

Director Larry Crawford and Acting Superintendent Cynthia Prudden respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court decision granting summary judgment to Respondent Roe is published at 439 F. Supp.2d 942 (W.D. Mo. 2006). App. B. The opinion of the Eighth Circuit Court of Appeals affirming the district court decision is published at 514 F.3d 789 (8th Cir. 2008). App. A. The Eighth Circuit Court of Appeals entered an order denying rehearing and rehearing en banc on February 27, 2008. App. C.

JURISDICTION

The Eighth Circuit Court of Appeals entered its judgment on January 22, 2008 (App. A), and entered its order denying petitioners' petition for rehearing and rehearing en banc on February 27, 2008. App. C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the Fourteenth Amendment Due Process Clause:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Under the Missouri Department of Corrections' revised policy on inmate abortions, the Department will only transport an inmate to obtain an abortion outside prison walls if the abortion is medically necessary. Medical necessity is determined by physicians exercising their professional judgment on a case-by-case basis. The Department does not provide transportation to inmates for any elective medical procedures. It does pay for childbirth expenses of its prisoners, and provides transportation and security for the birth. Under its previous policy on inmate abortions, the Department provided transportation and security for nontherapeutic abortions, but did not pay for the cost of the nontherapeutic abortions.

Plaintiffs, a class of current and future pregnant inmates who might seek elective abortions while in the Department's custody, sought: (1) a declaration that the policy unconstitutionally prevents inmates from exercising their right to decide to have abortions and shows deliberate indifference to their serious medical needs and (2) injunctive relief to prohibit enforcement of the policy. Following cross-motions for summary judgment, the

district court granted the declaratory relief sought by the plaintiff class.

The court of appeals affirmed the district court, holding that the policy cannot be maintained under the Fourteenth Amendment in light of *Turner v. Safley*, 482 U.S. 78 (1987). App. A-4 – A-14. The court of appeals determined that the policy did not violate the Eighth Amendment because an elective, nontherapeutic abortion is not a serious medical need, and a prison institution's refusal to provide an inmate with access to an elective, nontherapeutic abortion does not rise to the level of deliberate indifference. App. A-14 – A-21.

REASONS FOR GRANTING THE WRIT

Review is necessary to resolve "important question[s] of federal law" that have not yet been "but should be settled by this Court." Sup. Ct. R. 10(c). This Court has not addressed the scope of abortion rights in the prison context. Further, review is necessary because the court of appeals decided this important federal question in a way that conflicts with a relevant decision of this Court. *Id.*

The court of appeals opinion below conflicts with a prior decision of this Court. In *Maher v. Roe*, 432 U.S. 464, 478-80 (1977), this Court held that the Constitution did not forbid a State from pursuing a policy of furthering childbirth by choosing to pay the expenses incident to childbirth in its Medicaid program but not to pay the expenses incident to nontherapeutic abortions in that program. Thus, the Constitution should not forbid a State from pursuing

a policy in support of childbirth by choosing to pay expenses of its prisoners that are incident to transporting them for childbirth but declining to pay expenses that are incident to the transportation of prisoners for nontherapeutic abortions. Consideration of the conflict of the decision in this case with the *Maher* decision requires consideration of this Court, especially in light of the State of Missouri's strong policy in support of childbirth.

In furtherance of its interests in safety and efficient use of resources, as well as in support of the state policy in favor of childbirth, the Missouri Department of Corrections decided that it would not transport pregnant prisoners to outside medical facilities for them to obtain nontherapeutic abortions.[1] Even if the safety and efficient use of resources were not grounds for the decision not to transport for nontherapeutic abortions, the Department's policy is constitutionally sustainable based on the State's policy in favor of childbirth.

More than 30 years ago, this Court ruled that a State could, as a matter of policy, use the funds at its disposal to support childbirth and decline to use such funds to pay for nontherapeutic abortions. *Maher v. Roe*, 432 U.S. 464 (1977). In *Maher*, a class of women unable to obtain Medicaid assistance for abortions challenged the State of Connecticut's regulation denying Medicaid coverage for nontherapeutic abortions. *Id.* at 467. The district court ruled that the Equal Protection Clause

[1] The Department has in the past and continues to transport prisoners to outside medical facilities when necessary for them to obtain medically necessary care, including transports for therapeutic abortions.

prevented a State from excluding payments for expenses related to nontherapeutic abortions where that program paid medical expenses incident to pregnancy and childbirth. *Id.* at 468. After determining that the challenge should be measured under rational basis review, this Court noted the strong interest of States in encouraging normal childbirth and ruled that this interest provided a sufficient constitutional justification in the state decision to cover expenses related to childbirth in its Medicaid program, but not the expenses related to nontherapeutic abortions. *Id.* at 478-80.

Missouri's policy to pay the expenses to transport inmates for medically necessary care (including abortions when medically necessary), but not the expenses for abortions that are not medically necessary, is no different than Connecticut's Medicaid regulation. Just as Connecticut's choice not to use public funds to pay expenses incident to nontherapeutic abortions was constitutionally valid, so is Missouri's choice not to use public funds to pay the travel and security expenses incident to transporting inmates for nontherapeutic abortions. In contrast to the *Maher* holding that a state may appropriately decide not to use its resources to finance medically unnecessary abortions, the court of appeal's opinion in this case requires Missouri to expend public funds for such procedures. This Court should hear this case to assess the inconsistency between the *Maher* decision and the court of appeal's opinion.

Additionally, this Court should consider the important federal question of whether a woman's right, within certain limits, to elect to terminate a pregnancy is one of those rights that is so

inconsistent with incarceration that it does not survive imprisonment. The court of appeals remarked that the Department identified the right to an abortion as a privacy right and compared it to the right to make decisions about marriage as another privacy right. App. A-6, n. 2. The court of appeals then determined that, just as the right to marry does not completely end at the prison gate, neither does the right to choose an abortion. *Id.*

The ability of prison authorities to accommodate at least some incidents to the right to marriage, however, is significantly greater than their ability to accommodate the incidents to the right to an abortion. A marriage may be performed within the security perimeter of a prison, all visitation between spouses may be required to occur within the prison walls, and communications may occur in writing, without the incarcerated spouse ever leaving confinement. In contrast, abortions occur only outside of the prison and in surroundings that can be volatile. App. A -8- A-9. Thus, while it may be true that certain accommodations to the right to marriage can be made consistent with requirements of incarceration, the same is not true with regard to any accommodation to the right to an abortion. Unlike visits between spouses, expressions of emotional support, and perhaps certain other incidents of marriage, there is no ability by a prison to permit an abortion that does not breach the confinement and security requirements of imprisonment. The right to an abortion is really more akin to the right to procreate, which has been determined to be a right that does not survive imprisonment. *Gerber v. Hickman*, 291 F.3d 617, 621-23 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002).

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General
JAMES R. LAYTON
State Solicitor

MICHAEL PRITCHETT
Counsel of Record
Assistant Attorney General
EMILY A. DODGE
Assistant Attorney General

P.O. Box 899
Jefferson City, MO 65102
Phone No. (573) 751-3321
Fax No. (573) 751-9456

Counsel for Petitioner

May 27, 2008

APPENDIX

TABLE OF CONTENTS

APPENDIX A

Eighth Circuit Court of Appeals' Opinion, January 22, 2008 ..... A1

APPENDIX B

United States District Court's Order Dismissing Case With Prejudice, July 18, 2006 ..... A22

APPENDIX C

Eighth Circuit Court of Appeals' Order, February 27, 2008 ..... A44

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3108

Jane Roe,
Appellee

Larry Crawford, Director of the Missouri Department of Corrections; Cyndi Prudden, Acting Superintendent Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity,
Appellants

Submitted: September 24, 2007
Filed: January 22, 2008

Before WOLLMAN, HANSEN, and RILEY, Circuit Judges

RILEY, Circuit judge.

The Missouri Department of Corrections (MDC) instituted a policy of prohibiting transportation for elective, nontherapeutic abortions (MDC policy). Plaintiff Jane Roe (Roe) requested transportation for an elective abortion, and was denied. The district court granted Roe's request for emergency preliminary injunctive relief, and ordered the MDC to provide Roe with transportation outside of the MDC facility (referred to by the parties as an "outcount"). Roe amended her complaint and sought injunctive relief on behalf of a class consisting of all women in the custody of the MDC who seek elective, nontherapeutic abortions. The district court certified

the class (Plaintiffs). Both parties moved for summary judgment, which the district court granted in favor of the Plaintiffs. The district court reasoned the MDC policy is unreasonable under the Fourteenth Amendment using the four-part test established by *Turner v. Safley,* 482 U.S. 78, 89-91, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) for reviewing the reasonableness of prison regulations impacting constitutional rights. The district court also found the Plaintiffs' Eighth Amendment rights were violated, determining that the desire for an elective abortion constitutes a serious medical need to which the MDC officials were deliberately indifferent. On appeal, the MDC contests both findings. Although we conclude the district court erred in its Eighth Amendment analysis, and on one aspect of the *Turner* analysis, we affirm the ultimate judgment.

I. BACKGROUND

Before September 5, 2005, the MDC had a policy of providing transportation outcounts for inmates wanting to terminate their pregnancies. On that date, the MDC altered its policy, such that inmates would be transported for abortions only "[i]f [the] abortion is indicated due to threat to the mother's life or health, and if approved by the Medical Director in consultation with the Regional Medical Director." The MDC cited security concerns and cost savings motivating the change in policy. Although treatments for other conditions and injuries may be classified as elective, the attending physician may override the general policy of denying elective medical outcounts and authorize the outcount by determining that the care is in fact medically necessary. However, under the policy regarding

abortions, the MDC determined "[o]utcounts for elective abortions will no longer be authorized."

Plaintiff Roe, on behalf of herself and others similarly situated, challenged the legality of this MDC policy in federal district court. The district court granted summary judgment in favor of Roe, reasoning that under the *Turner* four-part reasonableness test, the MDC policy was an unreasonable restriction on inmates' Fourteenth Amendment right to terminate a pregnancy. Roe v. Crawford, 439 F.Supp.2d 942, 949-53 (W.D.Mo.2006). The district court also found Roe's Eighth amendment rights were violated, determining the desire for an elective abortion constitutes a serious medical need to which the MDC officials were deliberately indifferent. *Id.* at 953.

II. STANDARDS OF REVIEW

We review the grant of summary judgment de novo, viewing the record most favorably to the non-moving party. *Tipler v. Douglas County*, 482 F.3d 1023, 1025 (8th Cir.2007). Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Knowles v. Citicorp Mortgage, Inc.*, 142 F.3d 1082, 1085 (8th Cir.1998). Certain guiding principles come into play when federal courts review policy decisions made by a state's executive branch. Specifically, "[w]here, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Rizzo v. Goode*, 423

U.S. 362, 378, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976) (quotation omitted); *see also Angela R. v. Clinton*, 999 F.2d 320, 326 (8th Cir.1993) ("Federal courts operate according to institutional rules and procedures that are poorly suited to the management of state agencies.").

III. DISCUSSION

A. Turner Supplies the Appropriate Test

The district court found the applicable test for determining the constitutionality of the MDC policy was that articulated by the Supreme Court in *Turner*, Roe, 438 F.Supp.2d at 947-49. Roe contended, as she did in her opening brief on appeal, that Turner is inapplicable and her Fourteenth Amendment claim should be subjected to the same standard of review that would apply outside the prison context. *See Id.* at 947 (maintaining that the "undue burden" test should apply).[FN1] Essentially, Roe argued that the Supreme court's decision in *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005) should be extended. *See Roe*, 439 F.Supp.2d at 947-49. In *Johnson*, the Supreme court reviewed a policy that separated inmates on the basis of race. 543 U.S. at 507-08, 125 S.Ct. 1141. In so doing, the Court articulated that it had consistently held "that *all* racial classifications [imposed by government] ... must be analyzed by a reviewing court under strict scrutiny." *Id.* at 505, 125 S.Ct. 1141 (citation and internal quotation marks omitted). The Court reasoned the *Turner* test had

---

FN1. During oral argument, Roe conceded the applicable test in the prison context is still *Turner*. We agree, and for completeness, we address the issue.

never applied to racial classifications, and applied "*only* to rights that are inconsistent with proper incarceration." *Id.* at 510, 125 S.Ct. 1141 (quotation marks and citation omitted).

Racial classifications are viewed as immediately suspect, *see id.* at 509, 125 S.Ct. 1141, and their usage can seriously damage the integrity of a prison system. *See id.* at 510-11, 1255 S.Ct. 1141. On the contrary, *Turner* applies to prison restrictions relating to rights *not* typically subject to strict scrutiny. *See id.* at 510, 125 S.Ct. 1141 (listing First Amendment rights, access to courts, attendance at religious services, and some due process claims such as involuntary medication and restrictions on the right to marry, as remaining subject to *Turner*). Restrictions on abortion are not subject to strict scrutiny, but are void only when they place an "undue burden" on access to abortion. *See Planned Parenthood v. Casey,* 505 U.S. 833, 874, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Additionally, like marriage or attendance at religious services, access to abortion involves burdens on the prison system concerning allocation of resources which necessitate either allowing inmates out of the prison setting, or bringing persons into the facilities. Simply refraining from classifying prisoners on the basis of race involves no such burden. *Johnson*, 543 U.S. at 510, 125 S.Ct. 1141 ("The right not to be discriminated against based on one's race ... is not a right that need necessarily be compromised for the sake of proper prison administration."). The district court thus properly declined to apply the "undue

burden" test in this matter, and *Turner* represents the proper framework for analysis.[FN2]

B. Applying *Turner*

Prison regulations restricting constitutional guarantees are valid only if the regulations are "reasonably related to legitimate penological

---

FN2. The MDC recognizes the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), determined women have, within certain boundaries, a right to elect to terminate their pregnancies. Nevertheless, the MDC argues, because the right is grounded in the right to privacy, and some privacy interests are inconsistent with imprisonment, the privacy right to terminate a pregnancy does not survive incarceration. However, this argument does not withstand analysis. Although some rights may be so inherently inconsistent with incarceration, such as the right to travel, that any assertion of the right while in prison would automatically fail, even rights that are, in part, inconsistent with incarceration survive imprisonment, at least enough so that the *Turner* balancing test applies. Indeed, while contending that rights stemming from the right to privacy are automatically lost upon incarceration, the MDC admits "decisions about marriage" are among such privacy rights. This admission then fails to recognize the *Turner* decision *itself* struck down a regulation prohibiting marriage. *See* 482 U.S. at 94-99, 107 S.Ct. 2254. In so doing, the Supreme Court recognized that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration." *Id.* at 95, 107 S.Ct. 2254. But, the right to marry does not completely disappear upon imprisonment. *See id.* at 96, 107 S.Ct. 2254. Prison regulations impacting the right to marry may well be upheld, but must at least survive the scrutiny of the *Turner* balancing test. *Id.* Logically, this same analysis holds true for access to abortions as well. Certainly, no prisoner could simply elect to leave the institution at will to obtain an abortion. This does not, however, mean any exercise of the right is entirely inconsistent with incarceration, any more than is marriage, or the right to correspond with persons outside of the facility. *See Turner*, 482 U.S. at 91-92, 107 S.Ct. 2254.

interests." *Turner*, 482 U.S. at 89, 107 S.Ct. 2254. to determine whether a prison regulation is reasonably related to a legitimate penological interest, courts consider (1) whether there exists a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; 92) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) the existence, or absence of "obvious easy alternatives ... that fully accommodate [ ] the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 89-91, 107 S.Ct. 2254 (citations and internal quotation marks omitted).

1. Reasonable Relationship to Legitimate Penological Interests.

Roe argues the MDC's claim of security concerns was feigned, and the MDC was not entitled to *Turner* deference. The district court noted that, at the summary judgment stage, such a determination would be inappropriate because there existed at least a genuine issue of material fact regarding the sincerity of the MDC's asserted security concerns. *Roe*, 439 F.Supp.2d at 950. The district court therefore accepted the security concerns as credible. *Id.* This determination was appropriate, and is supported by the prison administrators' testimony articulating security concerns as a motivating factor for the change in the MDC policy. The district court then found the MDC policy does not rationally and actually advance the legitimate security interest. *Id.*

The MDC asserts alternate ways in which the policy purportedly advances security interests. First, the MDC contends *any* time an inmate is removed from prison, security is at risk. The MDC argues "[r]educing security risks by reducing the number of outcounts is a rational means of furthering the legitimate penological interest in prison security." The problem with this argument is that, based on the record, the MDC policy does not appear to reduce the number of outcounts. For example, other than for those inmates released before carrying their children to term, the MDC would still need to transport the pregnant inmates on outcounts for medical examinations associated with pregnancy, including delivery. During a pregnancy, the MDC refers inmates for outcounts for a number of procedures, including some of the ultrasounds. Although the MDC argues abortions may require two days, so do some deliveries. Many of these procedures are provided at the expense of Correctional Medical Services, which contracts with the MDC for the care of inmates. Inmates tend to have higher pregnancy-risk factors than the general population, necessitating increased levels of prenatal care, which could increase the number of outcounts necessary during the continued pregnancies. Thus, the MDC policy does not necessarily reduce the number of overall outcounts and the related security risk.

Second, the MDC claims the existence of protesters and the configuration of the clinic result in higher risks to the guards and inmates, as well as a greater potential for inmates to escape. *Id.* The concerns about heightened risks for the guards and inmates represents a far more defensible argument. Accepting, as the district court did, that security

concerns formed the basis of the MDC policy, sufficient evidence in the record demonstrates an attempt to minimize outcounts for abortions rationally advances this legitimate concern. For instance, a local Planned parenthood President and CEO testified large numbers of protesters regularly picket the facility, write down license plate numbers, and photograph and videotape the entering vehicles. Although the district court found it was "undisputed that in the past eight years, picketers have never interfered with the safety or security of ... inmates or staff," *id.*, this conclusion does not automatically make the MDC policy irrational. Prison officials should not be required to wait until a problem occurs before addressing the risk. *See Turner*, 482 U.S. at 89, 107 S.Ct. 2254 (reasoning prisons should have the authority "to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.").

Roe argues that deferring to this security interest would create an impermissible "heckler's veto," and that the government cannot allow protesters to effectively block the exercise of a legally protected activity.[FN3] Although logically analogous, the "heckler's veto" has been disapproved more in the context of First Amendment freedom of speech, and as it relates to the general public. *See, e.g. Lewis v. Wilson*, 253 F.3e 1077, 1081-82 (8th Cir.2002). If the

---

FN3 The "heckler's veto" involves situations in which the government attempts to ban protected speech because it might provoke a violent response. *See e.g., Cohen v. California*, 403 U.S. 15, 23, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). In such situations, "the mere possibility of a violent reaction to [protected] speech is simply not a constitutional basis on which to restrict [the] right to speak." *Lewis v. Wilson*, 253 F.3d 1077, 1081 (8th Cir.2001) (citing *Cohen*, 403 U.S. at 23, 91 S.Ct. 1780).

State of Missouri banned abortion in general, on the basis of concerns about societal disruption due to protests at the clinics, the principle would no doubt apply and the government would be required to take steps to ensure access, rather than enacting a ban. In the prison context, it is already established that whether or not a policy infringing on constitutional rights is valid depends on a balancing test which grants far more leniency to prison administrators than the government would be granted as to the general public. *See Turner*, 482 U.S. at 89-91, 107 S.Ct. 2254. Additionally the relative availability of the right at issue is appropriately addressed by the second *Turner* factor. *See Turner*, 482 U.S. at 90, 107 S.Ct. 2254.

Given the deference owed to prison officials in such matters, *See Rizzo*, 423 U.S. at 378, 96 S.Ct. 598, the district court erred in finding the MDC policy is irrational simply because no problems occurred in the past.[FN4] However, the *Turner* analysis does not end here. *Turner*, 482 U.S. at 89-91, 107 S.Ct. 2254.[FN5]

FN4. The MDC's contention that inmates removed from the facility for abortion outcounts are more likely to attempt an escape than inmates transported for other medical outcounts is less convincing. In contrast to inmates transported for labor and delivery, inmates on abortion outcounts are always physically guarded both during transport and at the facility.

Additionally, for the reasons stated previously, the MDC's argument that the MDC policy results in cost reductions by lessening the number of outcounts is without sufficient evidentiary support.

FN5. Although *Monmouth County Corr. Instit. Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir.1987), supports Roe's case in other respects, Monmouth County officials did not assert security as a justification for its policy. *See id.* at 336 & n. 15.

2. Alternative Means of Obtaining an Elective Abortion

The "second factor relevant in determining the reasonableness of a prison restriction ... is whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90, 107 S.Ct. 2254. The district court found the MDC policy entirely eliminated Plaintiffs' access to elective abortions. *Roe*, 439 F.Supp.2d at 951-52. This determination is correct, and weighs heavily against the validity of the MDC policy. Under the MDC policy, transportation outcounts are provided *only* for medically necessary, therapeutic abortions due to a threat to the mother's life or health. Once incarcerated in the MDC, an elective abortion, which the Supreme Court determined is a liberty interest protected under the Fourteenth Amendment, is *entirely* unavailable. The MDC recognizes this, and argues alternative means of obtaining an elective abortion exist: that is, the inmates can obtain an abortion before incarceration. This contention lacks merit. First, many inmates either will not know of their pregnancies, or will not have elected to terminate their pregnancies, before incarceration. Second, the MDC points to no authority, and we find none, indicating the Supreme Court has determined a right may be entirely eliminated during incarceration, simply because the right could have been exercised before imprisonment. In *Turner*, the Supreme Court struck down a regulation prohibiting marriage other than in exceptional circumstances. *Turner*, 482 U.S. at 95-99, 107 S.Ct. 2254. Under the MDC's reasoning, a complete prohibition on marriage would have been valid, because the inmates could have chosen to marry before beginning their prison terms, or after the imprisonment ended.

In the case lending the most support to the MDC's position, *Victoria W. v. Larpenter*, 369 F3d 475 (5th Cir.2004), the policy upheld by the Fifth Circuit did not act as a complete bar to elective abortion. *See id.* at 486 ("Elective [abortion] is not prohibited ... [r]ather, an inmate can receive the [abortion] by following a set procedure."). The policy in *Victoria W.* created an administrative hurdle, requiring inmates to obtain a court order authorizing an elective abortion before obtaining one. *Id.* at 477, 486. The goals of lessening outcounts, and of providing a layer of liability protection for the correctional facility, were recognized as valid. *Id.* at 486. The policy was rationally related to these goals and there were alternatives available, because the procedure was not onerous, and did not act as a complete bar to elective abortion. *See id.* at 486-87. The Fifth Circuit even distinguished *Monmouth County Corr. Instit. Inmates v. Lanzaro*, 834 F2d 326 (3d Cir.1987), because the policy at issue in *Monmouth* "required inmates to get a court order releasing them *on their own recognizance*, making it *more difficult* for full-security inmates to obtain an order of release." *Victoria W.*, 369 F.3d at 488 (emphasis added). The Fifth Circuit recognized that *"[c]ritically*, the options allowed by the [policy at issue], *unlike the policy in Monmouth*, ensure that a pregnant inmate who wants an abortion will obtain a court order." *Id.* (emphasis added). The MDC's policy goes far beyond the policy upheld in *Victoria W.*, and beyond the policy struck down in *Monmouth* (a requirement that the inmate obtain a court order allowing temporary release without supervision). *Monmouth*, 834 F2d at 329, 339-40. By completely eliminating any alternative means of obtaining an elective abortion, the MDC policy represents

precisely the "exaggerated response to ... security objectives" that *Turner* forbids. *Turner*, 482 U.S. at 97-98, 107 S.Ct. 2254.

3. Impact on Other Inmates and Prison Resources

The third *Turner* factor is "the impact accommodation of the asserted constitutional right will have on guards and other inmates and on the allocation of prison resources generally." *Id.* at 90, 107 S.Ct. 2254. The MDC contends, similar to its argument relating to security interests, that any increase in the number of outcounts places a strain on financial and staff resources that could have a negative impact on services provided to other inmates.[FN6] This argument fails for two reasons *First, as discussed in Section III(B) 1, *supra*, the policy does not logically reduce the overall number of outcounts. Second, an MDC official admitted the cost savings would be "minimal ... as compared to our general budget." Thus, this factor also weighs against the reasonableness of the policy. The purported impact of the MDC policy is so minimal that it further demonstrates the MDC policy represents an "exaggerated response to ... security objectives." *See Turner*, 482 U.S. at 97-989, 107 S.Ct. 2254.

FN6. The MDC asserts the policy regarding elective abortions represents nothing more than a specific application of a general policy regarding elective procedures. The record belies this claim and demonstrates that abortion is treated differently than other elective procedures. For example, although treatment for a particular injury may be classified as elective, the attending physician may override the policy and authorize the outcount. Conversely, under the MDC policy regarding abortions "[o]utcounts for elective abortions *will no longer be authorized.*" (emphasis added).

4. The Existence of Ready Alternatives.

[The fourth prong of *Turner* focuses on the absence or existence of "ready alternatives." 482 U.S. at 90, 107 S.Ct. 2254. "[I]f an inmate claimant can point to an alternative that fully accommodates the prisoner's rights to *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91, 107 S.Ct. 2254. As described before, maintaining the current policy results in *de minimis* cost savings, at best, and arguably increases costs, both in terms of financial resources and in terms of risks to staff (due to increased outcounts for prenatal care). Thus, reverting to the previous policy allowing outcounts for elective abortions represents a "ready alternative." Alternatively, the MDC could implement a policy similar to that in *Victoria W.*, requiring inmates to obtain a court order authorizing the abortion. *See* 369 F.3d at 479. Therefore, this factor also reinforces our holding that the MDC policy cannot withstand scrutiny under *Turner*.

C. Eighth Amendment Analysis

In addition to finding the policy invalid under *Turner*, the district court also found the MDC policy violated Roe's Eighth Amendment right to be free from cruel and inhumane punishment.[FN7] In light of

---

FN7. Incarceration does not alter the test relating to the constitutional protection against cruel and unusual punishment. *See Johnson*, 543 U.S. at 511, 125 S.Ct. 1141 (judging Eighth Amendment violations "under the 'deliberate indifference' standard"); *see also Hartsfield v. Colburn*, 491 F.3d 394, 396 (2007) (citation omitted) ("[I]t is now settled that deliberate indifference is the appropriate standard of

recent developments of the law, this finding was erroneous.

Under the Eighth Amendment, the MDC must "provide medical care for [prisoners]." *Estelle v. Gamble,* 429 U.S. 97, 103, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). "To prevail on an Eighth Amendment claim of deliberate indifference to serious medical needs, an inmate must prove that he suffered from one or more objectively serious medical needs, and that prison officials actually knew of but deliberately disregarded those needs." *Hartsfield v. Colburn,* 491 F.3d 394, 396-97 (2007) (citation omitted).

The district court found, for the same reasons outlined in Section III(B), *supra,* the MDC has knowingly erected a complete barrier to Roe's ability to obtain an elective abortion. *See Roe,* 439 F.Supp.2d at 953. Thus, the district court determined the MDC administrators must have been aware of the consequences of their actions and were, therefore, deliberately indifferent to the elimination of Roe's access to an elective abortion *See id.*

Beyond the MDC's discredited general argument that pregnant inmates retain access to elective abortions because they can terminate their pregnancies before incarceration, the district court's determination that the MDC policy blocks access to elective abortions is not challenged further. Rather, the MDC challenges the contention an elective, nontherapeutic abortion represents a "serious medical need." In effect, the MDC contends any

---

culpability for all claims that prison officials failed to provide pretrial detainees with adequate food, clothing, shelter, medical care, and reasonable safety." (citation and internal quotation marks omitted)).

elective procedure, by its very nature, cannot represent a "serious medical need." Indeed, some language in Eighth Circuit precedent appears to support this contention. *See Camberos v. Branstad,* 73 F.3d 174, 176 (8th Cir.1995) (defining a "serious medical need" as "one that has been diagnosed by a physician as requiring treatment, or one that is so obvious that even a layperson would easily recognize the *necessity* for a doctor's attention.") (citation omitted) (emphasis added). Logically, if a procedure is not medically necessary, then there is no *necessity* for a doctor's attention.

A recent district court opinion from the Fifth Circuit supports this contention. *See Victoria W. v. Larpenter,* 205 F.Supp.2d 580, 600-01 (E.D.La.2002). The district court in *Victoria W.* recognized that other courts had found "serious medical needs" in herniated discs, broken jaws, life-threatening ulcers, risk of suicides, and heart attacks. *Id.* at 600 (citations omitted). The court then found:

> At its heart, the Eighth Amendment protects prisoners from cruel and unusual punishment and needless suffering. An elective abortion sought for non-medical reasons ... is simply lacking in similarity and intensity to the other medical conditions that have been found to be serious medical needs under the Eighth Amendment.

Id. at 601. The *Victoria W.* district court concluded a medically necessary abortion certainly could qualify as a "serious medical need," but "[t]he inconvenience and financial drain of an unwanted pregnancy are simply insufficient in terms of the type of egregious

treatment that the Eighth Amendment prescribes." *Id.*[FN8]

On the other hand, the Third Circuit earlier in 1987 rejected reasoning identical to that of the district court in *Victoria W. See Monmouth,* 834 F.2d at 348-49. In *Monmouth,* the Third Circuit rejected the penal institution's argument that an elective abortion does not represent a "serious medical need." *Id.* In so doing, the Third Circuit majority reasoned:

> That pregnancy itself is not an "abnormal medical condition" requiring remedial, medical attention does not place it beyond the reach of *Estelle.* Nor does the fact that pregnancy presents a woman with the alternatives of childbirth or abortion affect the legal characterization of the nature of the medical treatment necessary to pursue either alternative... Here, the relevant medical care is that *necessary* to effectuate the inmates' choices to terminate their pregnancies. We find that the... inmates have firmly demonstrated the seriousness of the needed medical care.

Id. at 348 (emphasis added) (case italicization altered). The court majority concluded:

FN8. We recognize that, although upheld on appeal, the Fifth Circuit did not expressly adopt this same reasoning. *See Victoria W.,* 369 F.3d at 489-90. The Fifth Circuit reasoned the policy at issue did *not* block access from elective abortions. The policy in *Victoria W.* simply required the plaintiff to obtain a court order authorizing her to receive an elective abortion. *Id.* In Roe's case, this reasoning would not apply, because the MDC policy, as discussed in Section III(B), *supra,* completely denies access to inmates' elective abortions.

> [I]t is evident that a woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. Characterization of the treatment necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence in the context of the *Estelle* "serious medical needs" formulation. An elective, nontherapeutic abortion may nonetheless constitute a "serious medical need" where denial or undue delay in provision of the procedure will render the inmate's condition "irreparable."

Id. at 349 (case italicization altered).

As to the breadth of its decision, the *Monmouth* court itself was split on the interpretation of "serious medical need." *See* 834 F.2d at 355 (Mansmann, J., concurring). Concurring with the holding that the policy at issue was overbroad under the *Turner* analysis, Judge Mansmann "stop[ped] short, however, of adopting the majority's blanket assumption that the Eighth Amendment is also implicated merely because abortion is a medical procedure[,]" and was "unwilling to join what amounts to a quantum leap to the conclusion that a state's refusal affirmatively to provide elective abortions to female prisoners constitutes cruel and unusual punishment." *Id.* at 353-54. Judge Mansmann further criticized the majority for "bootstrapping the liberty interest protected by the Fourteenth Amendment into the Eighth[,]" and reasoned that the only way denying elective abortions could be considered cruel and unusual punishment would be to assume "a commonly

perceived inhumanity of refusing to provide elective abortions as a general matter." *Id.* at 355.

Roe cites *Johnson v. Bowers*, 884 F.2d 1053, 1056 98th Cir.1989) for the contention this court adopted the *Monmouth* majority position and rejected the notion that Eighth Amendment serious medical needs analysis can be reduced to distinguishing "elective" and "medically necessary" care. *Bowers*, however, does not actually stand for this broad of a proposition. In *Bowers*, the inmate had been stabbed and suffered nerve damage to his left forearm, leaving the prisoner unable to twist his wrist into a palms up position or to open his hand fully. *Bowers*, 884 F.2d at 1054. The reviewing physician repeatedly recommended surgery to avoid a permanent handicap. *Id.* at 1056. We refused to accept the "gratuitous classification of Johnson's surgery as 'elective.'" *Id.* We further explained such a gratuitous classification "does not abrogate the prison's duty, or power, to promptly provide *necessary* medical treatment for prisoners." *Id.* (citing *Monmouth*, 834 F.2d at 348 n. 32) (emphasis added). Thus although citing to *Monmouth*, *Bowers* only referenced *Monmouth* as support for the more limited holding that a *gratuitous* classification of a medical procedure as "elective" will not automatically remove the prison's responsibility to provide treatment, when that treatment is actually *"necessary"* for the health of the prisoner. *Id.* (emphasis added).

The Supreme Court has made it clear that the state has no affirmative duty to provide, fund, or help procure an abortion for any member of the general population. *See Rust v. Sullivan*, 500 U.S. 173, 178, 203, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991) (upholding federal regulation prohibiting federally

funded medical clinics from counseling or referring women for abortion); *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 511, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (upholding Missouri statute prohibiting the use of public facilities or personnel from performing nontherapeutic abortions); *Harris v. McRae*, 448 U.S. 297, 302, 311, 318, 100 S.Ct. 2671, 65 L.Ed.2d 784 (1980) (upholding congressional restriction of Medicaid funds for any abortion unnecessary to protect the life of the mother, or in cases involving rape or incest).[FN9]

The views articulated in the *Monmouth* concurrence and in the *Victoria W.* district court opinion represent the better interpretation of Eighth Amendment requirements and are more consistent with Supreme Court precedent. We hold an elective, nontherapeutic abortion does not constitute a serious medical need, and a prison institution's refusal to provide an inmate with access to an elective, nontherapeutic abortion does not rise to the level of deliberate indifference to constitute an Eighth

---

[FN9]. These cases demonstrate the *Monmouth* majority decision was exceptionally broad, in that the *Monmouth* decision also went so far as to hold that the prison was required to fund the procedure for those inmates unable to pay. *Monmouth*, 834 F.2d at 344-45 & n. 28, 351 (reasoning that the state must pay for treatment of "serious medical needs" under the Eighth Amendment, and finding that elective abortion constitutes such a need). When courts have found "serious medical needs" those needs have been medical *necessities* society would commonly fund via Medicaid or similar programs for those who cannot afford care. *See Victoria W.*, 205 F.Supp.2d at 600. Medical conditions need not be emergencies in order to be considered serious. *See Ellis v. Butler*, 890 F.2d 1001, 1003 n. 1 (8th Cir.1989). However, even the most basic medical provisions classified as serious under *Estelle* represent care that society has long considered "necessary" and will provide for the indigent.

Amendment violation. On this issue, the district court erred.

IV. CONCLUSION

Although the district court erred in finding the MDC policy invalid under the Eighth Amendment, the MDC policy cannot be maintained under the Fourteenth Amendment in light of *Turner*. The judgment of the district court is affirmed.

C.A.8 (Mo.), 2008.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

No: 05-4333-CV-C-DW

JANE ROE,
Plaintiff

LARRY CRAWFORD, et al.
Defendants

ORDER

[Filed: July 18, 2006]

Before the Court are Parties' cross-motions for summary judgment. (Docs. 57 and 60). For the following reasons, Plaintiffs' Motion for Summary Judgment (Doc. 57) is GRANTED Defendants' Motion for Summary Judgment is DENIED. [1]

I. Factual Background

This case stems from the official policy of the Missouri Department of Corrections ("DOC") prohibiting transportation of pregnant inmates off-

[1] Both Plaintiffs' and Defendants' Motion for Summary Judgment address identical legal arguments and, as discussed below, present no genuine issues of material fact. Accordingly, the Court addresses the motions and legal arguments therein simultaneously.

site to provide abortion care for nontherapeutic abortions.[2] Missouri DOC maintains two institutions for female offenders: Women's Eastern Reception, Diagnostic and Correctional Center ("WERDCC"), and the Chillicothe Correctional Center. All pregnant inmates are incarcerated at WERDCC.

DOC transports inmates from DOC institutions for, among other things, court appointments medical appointments, work release, intra-institution transfers, and occasionally to take the State Board of Cosmetology examination. Any departure from institutional grounds is referred to as an "outcount." WERDCC handles approximately eight outcounts per day, seven days a week, averaging 197 outcounts per month in 2005.

DOC contracts with Correctional Medical Services ("CMS") for the provision of medical care to inmates in the Department's custody. CMS provides a range of health services on-site at WERDCC, including dental care, mental health care, radiology, optometry and mammography. When an inmate requires specialized medical, mental health, or dental services beyond the capability of the on-site health care system, CMS personnel refer her to an off-site specialist or facility. For all off-site medical appointments, CMS personnel schedule the appointment and notify the office of the Chief of Custody of the date and time. The office of the Chief of Custody is responsible for making the necessary security and transport arrangements. Of the roughly 200 outcounts that the Chief of Custody handles per month, about 155 are for medical care. Given the volume of medical

---

[2] Defendants refer to nontherapeutic abortions as "elective." The Court uses these terms interchangeably.

outcounts, it is not uncommon for the office of the Chief of Custody to reschedule or rearrange appointments depending on staff and vehicle availability.

In any given month, there are anywhere from 35 to 50 pregnant inmates at WERDCC. CMS provides pregnancy-related care to these inmates on site, but also transports inmates off-site for obstetrical or gynecological care. In 2005, Defendants transported approximately 91 inmates off-site for labor and delivery. An inmate in labor is transported to the hospital without any restraints, regardless of her custody level. Two officers typically provide the transport and one officer will remain with the inmate at the hospital throughout the duration of her stay, anywhere from one to three days, on average. Defendants pay for all the costs associated with prenatal care and childbirth, including transportation and security.

For several years prior to July 2005, Defendants had provided access to nontherapeutic abortion services to inmates who wished to terminate their pregnancies. Pursuant to the DOC policy under which these outcounts would occur, neither WERDCC nor DOC is involved in the process of obtaining an elective abortion for an inmate. The inmate and her social worker would be responsible for determining the cost of the procedure and scheduling the procedure.

From 1998 to 2005, Defendants transported seven inmates for abortion services, each of which was considered elective by Defendants. Under the former policy, the abortions are typically performed at Reproductive Health Services of Planned Parenthood of the St. Louis Region (RHS), and all inmates are responsible for paying for the abortion procedure. Two female corrections officers

accompany the inmate to RHS for the procedure, which typically takes one 8-hour shift. While inmates arrive at RHS with wrist restraints, they are not restrained during the procedure.

During this time in which Defendants provided transport for abortion services, no security problems were reported during any abortion-related outcount, nor did transport of an inmate for an abortion cause delays in another inmate receiving medical care. When compared to DOC's general budget, the costs to DOC for an abortion outcount are, according to Defendants, "infrequent" and "minimal." Moreover, the costs associated with an abortion outcount are similar to the general costs associated with medical transports.

In early 2005, the issue of discontinuing transports for abortion services first arose. At this time, DOC was facing considerable budget cuts. Hearings were held on the Department's budget and Defendants were questioned by the Missouri House and Senate about the practice of transporting inmates for abortion services. Defendants were contacted by the legislative branch, both via letter and in person, regarding concerns over transports for elective abortions. Up until July 2005, the Policy remained unchanged.

On or about July 6, 2005, Defendants received a request from inmate JT[3] for an abortion. Her request was initially approved by Defendant Cynthia Prudden, then Acting Superintendent of WERDCC. An abortion appointment was scheduled for July 8, 2005 but the procedure was postponed pending approval at the executive level. At the request of Steve Long, Acting Director of the

---

[3] To protect inmates' confidentiality, inmates are referred to by their initials or by a pseudonym.

Division of Adult Institution, Patricia Cornell, Assistant Director of the Division of Adult Institution, prepared a memorandum reviewing the impact abortion transports had on DOC's costs and resources. Comparative costs to DOC in providing inmates with pregnancy related care, including transporting pregnant inmates for prenatal care and labor and delivery were not considered at this time, or thereafter. On July 19, 2005, Long informed Prudden, via memorandum, that JT's request was denied because the procedure was elective and not required to maintain her health. He stated that the transport "presents unnecessary security risks and requires staff resources that are better utilized in other operational areas. Additionally, state statute prohibits the use of our funds to assist with an abortion that is not necessary to save the life of the mother."

On August 22, 2005, Plaintiff Jane Roe was transferred to WERDCC from California custody. Roe was initially admitted to WERDCC in early 2005 on a drug charge. She was subsequently paroled, but re-arrested in California for violating the conditions of her probation. She learned of her pregnancy while in custody in California and requested access to abortion services at that time. Before she could obtain the procedure, however, she was returned to Defendants' custody and readmitted to WERDCC. Upon readmittance, Roe asked Defendants for access to abortion services and subsequently repeated this request to various medical and non-medical personnel at WERDCC. Her request was denied on August 30, 2005.

Upon the decision of Larry Crawford and Steve Long, in consultation with General Counsel Daniel Gibson, on September 5, 2005, DOC Policy IS

11-58 was revised to state in relevant part, that Defendants will transport inmates for abortion care if "an abortion is indicated due to threat to the mother's life or health, and if approved by the Medical Director in consultation with the Regional Medical Director." According to Crawford, the reason for the Policy change was prompted by concerns over "security, staff, money and a statute that clearly was not encouraging and may actually be saying that it was unlawful for a nonmedical [sic] purpose."

Plaintiff Roe, after contacting counsel and attempting to administratively resolve the matter of Defendants' August 30 denial of her request, sought emergency temporary relief from this Court on October 12, 2005. On October 13, 2005, the Court granted Plaintiff's Motion for a Preliminary Injunction and ordered Defendants to transport Plaintiff for the purpose of providing medical services to terminate her pregnancy. After a series of delays prompted, in part, by Defendants' outright refusal to comply with the Court's Order, Plaintiff Roe was transported to RHS on October 20, 2005 to receive medical services to terminate her pregnancy. Thereafter, Plaintiff amended her Complaint and moved to certify the action as a class action. On November 28, 2005, the Court certified the following class pursuant to Federal Rule of Civil Procedure 23(b)(2):

> All pregnant women who are seeking or may in the future seek nontherapeutic abortions and who are in the custody of Defendants at the time Plaintiff Roe filed her Verified Complaint in this case or who will be placed in the custody of Defendants in the future

and may while in the custody of Defendants seek a nontherapeutic abortion.

II. Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Issues of fact must be material to a resolution of the dispute between the parties; where the only disputed issues of fact are immaterial to the resolution of the legal issues, summary judgment is appropriate. Case v. ADT Automotive, 17 F. Supp. 2d 1077 (W.D. Mo. 1997) (citing Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992)).

In ruling on a motion for summary judgment, it is the court's obligation to view the facts in the light most favorable to the adverse party and to allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Anderson v. Liberty Lobby, 477 U.S. 242, 252-255 (1986); Inland Oil and Transport Co. v. United States, 600 F.2d 725, 727 - 28 (8th Cir.), cert. denied, 444 U.S. 991 (1979).

III. 14th Amendment Claim

Plaintiffs' first claim alleges that Defendants' Policy violates Plaintiffs' Fourteenth Amendment right to an abortion, as articulated in Roe v. Wade, 410 U.S. 114 (1973) and reaffirmed in Planned Parenthood v. Casey, 505 U.S. 833 (1992).

A. Standard of Review

It is well-settled that imprisonment does not automatically deprive a prisoner of his or her constitutional rights or valid constitutional claims.[4] Turner v. Safely, 482 U.S. 78, 84 (1987). Imprisonment does permit greater restriction of constitutional rights than would otherwise be constitutionally valid and many constitutional rights enjoyed prior to incarceration are curtailed or lost upon imprisonment. Beard v. Banks, 126 S.Ct. 2572, 2577-78 (2006); Overton v. Bazzetta, 539 U.S. 126, 128 (2003). As a matter of longstanding general principle, a prison regulation that impinges upon inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." Turner, 482 U.S. at 89. More recently, however, the United States Supreme Court has held that a prison regulation impinging on inmates' right to be free from racial discrimination should be analyzed under a strict scrutiny standard of review, not pursuant to the Turner reasonable-relationship test. Johnson v. California, 543 U.S. 499 (2005). In so ruling, the Court stated that Turner applies only to those rights "inconsistent with proper prison administration." Id. at 510.

Plaintiffs argue that in light of Johnson, the Court should scrutinize their Fourteenth Amendment claim not pursuant to Turner, but under

---

[4] In various instances throughout the briefing of these motions, Defendants argue that many of inmates' constitutional rights are *completely foreclosed* as a result of incarceration, including the right to receive an abortion. Defendants' argument in this respect is unfounded. Federal courts have taken great pains to recognize the valid constitutional claims of inmates and to make clear that "[p]rison walls do not forma a barrier separating prison inmates from the protections of the Constitution." Turner, 482 U.S.C. at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405-406 (1974)).

the same standard of review that would apply outside of the prison context - the Casey undue burden test. Casey, 505 U.S. 833.

This argument warrants a brief discussion of both Turner and Johnson. In Turner, the court was presented with constitutional challenges to two rules: one barring inmate-to-inmate correspondence and another restricting inmate marriage. Turner, 482 U.S. at 91-93. Turner balanced the principle that certain constitutional rights survive incarceration with the principle that prison administration is best left to the legislative and executive branches, not federal courts. Id. at 84-85. In balancing these considerations, Turner held that a prison regulation that impinges upon an inmate's constitutional rights is valid if "it is reasonably related to legitimate penological interests" and articulated four factors relevant in determining the constitutionality of a regulation.[5] Id. at 89. The Supreme Court upheld the rule barring inmate-to-inmate correspondence as constitutional and invalidated the regulation restricting inmate marriage.

In Johnson, the plaintiff brought an equal protection challenge to a prison policy that placed new or transferred inmates with cellmates of same race during initial evaluation. The Court of Appeals evaluated the prison regulation under Turner and upheld the regulation as reasonably related to a legitimate penological interest. Upon review, the

---

[5] These factors, discussed more thoroughly below, are as follows: (1) whether the policy rationally and actually advances a neutral and legitimate government interest; (2) whether the prisoner has alternative means of exercising the same right; (3) the effect proposed accommodations will have on prison resources; and (4) whether the existence of obvious, easy alternatives that impose a *de minimis* cost reflect the unreasonableness of the regulation. Turner, 482 U.S. at 89-91.

Supreme Court reversed, holding that the regulation should have been subject to a strict scrutiny review rather than the more lenient Turner standard. In so ruling, the

Court emphasized that the Turner reasonable-relationship test is applied *"only* to rights that are 'inconsistent with incarceration.'" Johnson, 543 U.S. at 510 (citations omitted). The Court reasoned that the right to be free from racial discrimination is not a right "that need necessarily be compromised for the sake of proper prison administration" and therefore is not susceptible to the logic of Turner. Id. at 510 (quotations and citations omitted).

Plaintiffs argue that a woman's due process right to choose to terminate a pregnancy is, like the right not to be discriminated against based on one's race, not a right that need necessarily be compromised for the sake of proper prison administration. Id. at 510. Under this reasoning, the Defendants' Policy would be subject to the undue burden test articulated in Casey.

The Court declines to read Johnson so broadly. The Supreme Court has consistently held that incarceration necessarily limits many privileges and rights, and in Johnson, expressly referred to many rights that may be so limited, such as First Amendment challenges to prison regulations, restrictions on freedom of association, limitations on inmate correspondence, restrictions on inmates' access to courts, restrictions on receipt of subscription publications, the involuntary medication of mentally ill prisoners, and restrictions on the right to marry. Id. at 1149 (citations omitted). The Court finds that a due process claim challenging a restriction on a woman's right to have an abortion is more similar to a due process claim challenging a restriction on the

right to many than it is to an equal protection challenge to a raced-based prison regulation. A woman's right to terminate her pregnancy is encompassed by the right of privacy founded in the Fourteenth Amendment's concept of personal liberty. Roe v. Wade, 93 S.Ct. 705, 727 (1973). This right is far from unqualified; the Supreme Court in Roe expressly rejected the idea that the right to have an abortion is unlimited. Id. at 727. In contrast, the right to be free from racial discrimination has, in all circumstances, including the prison context, been zealously guarded from encroachment by the Supreme Court. See, e.g., Johnson 543 U.S. at 505. This Court agrees with Chief Judge Walker of the Northern District of California, who opined that Johnson "appeared to reaffirm the application of Turner's reasonable relationship analysis to `rights that are inconsistent with proper incarceration, ' specifically, freedom of association, a right referred to in Johnson as one that may be properly limited in the prison context. Stewart v. Alameida, 418 F.Supp.2d 1154, 1162 (N.D. Cal. 2006). This Court accordingly holds that as Johnson expressly affirmed that some due process claims are properly analyzed under Turner, Plaintiffs' instant due process claim is most properly analyzed under Turner.

Furthermore, no court to consider Johnson has interpreted its holding as broadly as Plaintiffs here suggest. See e.g., Tolbert v. McGrath, No. C 04-3039 SI (PR), 2005 WL 3310065 at *6 (N.D. Cal., Dec. 7, 2005) (citing Johnson for the proposition that "[w]here a prison regulation (other than a race-based one) impinges on inmates' constitutional rights, the regulation or practice is valid if it is reasonably related to legitimate penological interests"); Meggett v. Penn. Dept. of Corr., 892 A.2d 872, 885 (Pa. 2006) (limiting Johnson to the holding that "Turner was

never intended to extend to equal protection cases that arise in prison that implicate suspect classes.").

Accordingly, the Court declines to analyze Plaintiffs' Fourteenth Amendment claim under Casey and instead will apply the four-part test announced in Turner.

B. Analysis

As stated above, under the standard articulated in Turner, prison regulations that curtail constitutional rights are valid only if they are "reasonably related to penological interests." Turner, 482 U.S. at 89. To determine whether a policy that restricts inmates' constitutional right is reasonably related to a legitimate penological interest, courts consider (1) whether the policy "rationally and actually advances a neutral and legitimate government interest; (2) whether the prisoner has alternative means of exercising the same right; (3) the effect proposed accommodations will have on prison resources; and (4) whether the existence of `obvious, easy alternatives' that impose *a de minirnis* cost" reflect the unreasonableness of the regulation. Salaam v. Lockhart, 905 F.2d 1168, 1171 (8th Cir. 1990) (quoting Turner, 482 U.S. at 89-91).

1. Reasonable relationship to Penological interests

Turner first requires the existence of "a `valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89.

Legitimate penological interests include the deterrence of crime, rehabilitation of prisoners, and institutional security. Monmouth County Corr. Instit. Inmates v. Lanzaro, 834 F.2d 326, 333 (3d Cir. 1987)

(citations omitted). See also O'Lone v. Estate of Shabazz, 482 U.S. 342, 348 (1987); Procunier, 416 U.S. at 412.

Defendants put forth the following reasons to justify the Policy: (1) security concerns; (2) conservation of prison resources, both in terms of costs and availability of staff, and (3) the possibility that transport of an inmate for an abortion will delay other scheduled medical appoints; and (4) the existence of a state statute prohibiting the use of state funds or facilities for an abortion.

Out of the many penological interests put forward by Defendants, only Defendants' purported security interest constitutes a valid penological interest. The other asserted interests - conservation of prison resources and the possibility that transport of an inmate for an abortion will delay other scheduled medical appointments - are not independent valid penological interests and are more appropriately considered under Turner's third prong. Lanzaro, 834 F.2d at 336-337 & n.18. Defendants also argue that the existence of a state statute prohibiting the use of state funds or facilities for an abortion justifies the Policy. While a state certainly has a legitimate interest, penological or not, in abiding by its own laws, as discussed below, this argument fails as a matter of law.

a. Security Concerns

As a threshold matter, Plaintiffs argue that Defendants' concern for security in no way motivated Defendants' change of policy and is little more than post-hoc rationalizing. Instead, Plaintiffs argue that the undisputed facts show that implementation of the Policy was triggered by politics and budget cuts and that Defendants are therefore not entitled to Turner

deference. Quinn v. Nix, 983 F.2d 115,118 (8th Cir. 1993) (prison officials are "not entitled to the deference described in Turner . . . if their actions are not actually motivated by legitimate penological interests at the time they act."). While the combination of undisputed facts relied upon by Plaintiffs for this proposition certainly implies that Defendants did not consider security implications in implementing the Policy, because this motion is one for summary judgment, the Court is obliged to view all facts and draw all inferences in favor of the non-moving party. Anderson, 477 U.S. at 252-255. Accordingly, the Court will, for the purposes of this motion, accept the proffered security concern as credible and assess whether the Policy rationally and actually advances this legitimate government interest.

Every prisoner transport raises a variety of security concerns, for the prisoner, the guard(s), and third parties. In this case, the undisputed evidence shows that inmates who choose to terminate a pregnancy and must be transported outside of prison for that purpose pose no greater security risk than any other inmate that requires outside medical attention. Lanzaro, 834 F.2d at 338. Seven days a week, Defendants transport many different prisoners off-site for medical and non-medical reasons, averaging nearly 200 transports each month at WERDCC alone. Out of these thousands of outcounts over the years, only ten transports have occurred for abortion procedures from 1998 - 2005, all without incident.

Defendants raise numerous arguments, none of which present a genuine issue of material fact on this point. They first claim that there are greater security concerns for inmates on outcounts to receive abortion services because of the presence of picketers

at facilities providing abortion services. Defendants fail to present any material fact showing that the presence of picketers in fact increases security concerns. Rather, it is undisputed that in the past eight years, picketers have never interfered with the safety or security of DOC inmates or staff. Next, Defendants claim that inmates transported for abortion are more likely than other pregnant inmates on medical outcounts to attempt an escape. Defendants again fail to offer evidence substantiating this claim. Conversely, the undisputed evidence is that, unlike inmates transported for labor and delivery, inmates on abortion outcounts are restrained both during transport and upon arrival at the facility. Lastly, Defendants contend that abortion outcounts result in reduced security in the prison facilities. The undisputed facts show that coverage at WERDCC is not reduced because officers are specifically assigned to transport shifts and additional officers are scheduled in advance to cover extra transport shifts as necessary.

The undisputed evidence shows that Defendants' Policy is not related to any perceived security risks. It prohibits transports for *all* inmate elective abortions - regardless of the specific security risks posed by a particular inmate, thereby impermissibly centering "around the nature of the treatment." Lanzaro, 834 F.2d at 338.

b. Missouri State Prohibition on the Use of Missouri State Funds to Assist with an Abortion

Defendants also argue that the Policy is justified on the grounds that (a) the State of Missouri is not constitutionally obligated to subsidize nontherapeutic abortions; and (b) Missouri law prohibits the use of Missouri funds to assist with an

abortion not necessary to save the life of the mother, thereby justifying the Policy.

Defendants' arguments on this point are less than clear. First, this case simply does not concern state subsidization of abortion services. To the extent that Defendants argue that Missouri is not constitutionally obligated to subsidize abortion services, they fail to address what would be the relevant point - whether providing transport to an inmate to receive an abortion constitutes the use of public funds to obtain an abortion. However, the issue of whether Missouri's statutory ban on assisting an abortion prohibits transport of an inmate to a medical facility for the procedure is already a matter of established Eighth Circuit law. Upon the State's urging, the Eighth Circuit rejected this very argument in Reproductive Health Servs. v. Webster, 851 F.2d 1071, 1084, *rev'd on other grounds*, 492 U.S. 490 (1989), holding explicitly that Missouri law prohibiting the use of Missouri State funds to assist with an abortion does not encompass transport to the location where the procedure is to take place:

> We cannot accept the conclusion that "assisting" an abortion encompasses driving or escorting the patient to the location where the procedure is to take place. The abortion itself does not take place in the vehicle or as the patient is being escorted. We think a more reasonable interpretation of the phrase "assisting an abortion" is the one suggested by the state: direct participation in the surgical procedure itself . . . the statute does not prevent

> state employees from arranging for abortion procedures for inmates or from transporting and escorting inmates to abortion facilities.

Id. Defendants appear to contest this ruling by citing the Supreme Court decision in Webster v. Reproductive Health Servs., 492 U.S. 490, 509-10 (1989) as follows: "Having held that the State's refusal to fund abortions does not violate Roe v. Wade, it strains logic to reach a contrary result for the use of public facilities and employees." This statement, however, is inapplicable to the use of Missouri *funds* in assisting with an abortion. The Court of Appeals for the Eighth Circuit clearly ruled that Missouri law prohibiting the use of state funds did not include driving an inmate to a location to receive an abortion and the State of Missouri did not appeal that issue to the Supreme Court.

2. Inmates' Ability to Otherwise Exercise Their Right

"A second factor in determining the reasonableness of a prison restriction . . . is whether there are alternative means of exercising the right that remain open to prison inmates." Turner, 482 U.S. at 90. Unless Defendants provide the necessary transportation, Plaintiffs are unable to exercise their right to choose to terminate their pregnancy. Defendants argue that a plaintiff is not completely barred from exercising that right as a plaintiff may obtain an abortion before the incarceration term commences. Turner analyzes the prison regulation, as applied to inmates, not as applied to individuals before incarceration. Id. at 90. It is clear that unless Defendants provide transport for inmates to receive

abortion services, there is no alternative way for an inmate to obtain a nontherapeutic abortion.

3. The Effect of Accommodation of the Right on Prison Resources

A third consideration under Turner is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." Id.

It is undisputed that the impact of a woman's right to terminate a pregnancy does not increase the burden on prison resources, including guards and other inmates. Defendants argue that abortion outcounts will force the rescheduling of other scheduled medical appointments for prisoners and that such a need to reschedule will unduly burden prison staff. The facts present the contrary - abortion outcounts have no distinct or measurable impact on the ongoing prison need to schedule and reschedule many medical appointments. At the WERDCC, Defendants average almost 200 outcounts per month, 155 of which are for medical care. Defendants admit that conflicts and rescheduling of transport of inmates for off-site medical care are regular occurrences and fail to present any evidence where the transport of an inmate for an abortion has hindered the medical care of another inmate, much less any evidence that the need to reschedule medical appointments for prisoners based on the need to schedule abortion outcounts unduly impacts prison resources.

Defendants also argue that the elimination of nontherapeutic abortion outcounts will conserve prison costs. The facts again contradict this argument. Only ten transports have occurred for abortion procedures from 1998 - 2005. In each instance, the

pregnant inmate has been responsible for the cost of abortion medical care. In contrast, WERDCC, on average, has over 90 outcounts per year for delivery and pregnancy-related medical care, the cost of which is borne by the Defendants. In addition, Defendants concede that the cost of transporting inmates for abortion is "minimal." In sum, the evidence shows that the "[a]ccomodation of the inmate's choice to terminate her pregnancy under the same terms currently available to pregnant inmates option for childbirth will impose no more, and indeed probably less, administrative and financial burdens on [prison] officials." Lanzaro, 834 F.2d at 341- 42.

4. Absence of Ready Alternatives and Existence of a Ready Alternative at a De Minimis Cost

Lastly, Turner declares that "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Turner, 482 U.S. at 90.

Defendants' Policy prohibits all nontherapeutic abortions. Defendants argue that no alternative to the Policy exists, and therefore, the Policy is necessarily reasonable. This argument fails to consider the full extent of the Supreme Court's guidance in Turner. In discussing the absence of ready alternatives to a prison policy, the Turner court stated that if an inmate is able to point to "an alternative that fully accommodates the prisoner's right at *de minimis* costs to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." Id at 91.

The evidence shows that Defendants can fully accommodate Plaintiffs' rights at a *de minimis* cost to security, the penological interest articulated by

Defendants. As discussed above, provision of abortion outcounts does not affect valid security interests. Indeed, Defendants have accommodated the right with little difficulty since 1998. It is clear that the past practice of providing transports has proven to be a ready and workable alternative to the current Policy, evidencing that "the regulation is not reasonable, but is an `exaggerated response' to prison concerns." Id. at 90.

IV. Eighth Amendment

Plaintiffs also allege that Defendants' Policy violates the Eighth Amendment because it constitutes deliberate indifference to inmates' serious medical needs. Under the Eighth Amendment, Defendants are obligated to "provide medical care for those whom it . . . incarcerat[es]." Estelle v. Gamble, 429 U.S. 97, 103 (1976). Estelle announced a two-pronged standard for Eighth Amendment claims: the challenged action and/or policy must (1) exhibit deliberate indifference on the part of prison officials and (2) the prisoner's medical needs must be serious.[6] Lanzaro, 834 F.2d at 346 (citations omitted).

Deliberate indifference is evident when officials erect barriers and outright denials to medical treatment. Id. at 347. Such deliberate indifference is unconstitutional only when it is directed toward a "serious medical need." As in Lanzaro, the relevant medical need in this case is the abortion services needed for inmates to terminate their pregnancies, if

---

[6] Like the right to be free from discrimination based on race, the right to be free from cruel and unusual punishment is evaluated, not under Turner, but under the standard of review that applies outside of the prison, the "deliberate indifference" standard. Johnson, 543 U.S. at 511.

they so choose. Defendants argue, without legal support, that nontherapeutic abortion is not a "serious medical need." This Court adopts the reasoning in Lanzaro where the Court of Appeals for the Third Circuit found that denial of a nontherapeutic abortion constitutes a "serious medical need" under Estelle:

> In sum, it is evident that a woman exercising her fundamental right to choose to terminate her pregnancy requires medical care to effectuate that choice. Denial of the required care will likely result in tangible harm to the inmate who wishes to terminate her pregnancy. Characterization of the treatment necessary for the safe termination of an inmate's pregnancy as "elective" is of little or no consequence in the context of the Estelle "serious medical need" formulation. An elective, nontherapeutic abortion may ... constitute a "serious medical need" where denial or undue delay in provision of the procedure will render the inmate's condition "irreparable."

Lanzaro, 834 F.2d at 349.

Having shown that Defendants intentionally deny Plaintiffs' the right to have an elective abortion, in conjunction with the Third Circuit's designation of a nontherapeutic abortion as a "serious medical need," Plaintiffs have established the absence of a genuine issue of material fact, and are accordingly entitled to judgment in their favor as a matter of law.

V. Conclusion

For the forgoing reasons, the Court concludes that Defendants' Policy violates both the Fourteenth and Eighth Amendments of the United States Constitution. Plaintiffs' Motion for Summary Judgment (Doc. 57) is GRANTED. Defendants' Motion for Summary judgment is DENIED.
IT IS SO ORDERED

/s/ DEAN WHIPPLE
Dean Whipple
United States District Judge

DATE: July 18, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3108

Jane Roe, Appellee

Larry Crawford, Director of the Missouri Department of Corrections; Cyndi Prudden, Acting Superintendent Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity, Appellants

Chuck Gross and Delbert Scott, Senators, Amici on Behalf of Appellant

American College of Obstetricians and Gynecologists, et al, Amici on Behalf of Appellee

Appeal from U.S. District Court for the Western District of Missouri-Jefferson City
(2:05-CV-04333-DW)

Order

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 27, 2008

Order Entered at the Direction of the court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

No. 07-1491

FILED
JUN 26 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

LARRY CRAWFORD, Director of the Missouri Department of Corrections, CYNDI PRUDDEN, Acting Superintendent Women's Eastern Reception, Diagnostic and Correctional Center, in her official capacity,

Petitioners,

—v.—

JANE ROE, individually and on behalf of all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

DIANA KASDAN
TALCOTT CAMP
LOUISE MELLING
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street
18th Floor
New York, New York 10004
(212) 549-2633

THOMAS M. BLUMENTHAL
Counsel of Record
165 North Meramec Avenue
6th Floor
St. Louis, Missouri 63105
(314) 727-2266
Cooperating Attorney for the ACLU of Eastern Missouri Fund

ANTHONY E. ROTHERT
ACLU of Eastern Missouri Fund
454 Whittier Avenue
St. Louis, Missouri 63108
(314) 652-3111

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals properly held that the Missouri Department of Corrections policy prohibiting inmates from obtaining non-therapeutic abortions violates the Fourteenth Amendment?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)..... 6

Bryant v. Maffucci, 923 F.2d 979 (2d Cir. 1991)..... 4

Doe v. Arpaio,
150 P.3d 1258 (Ariz. Ct. App. 2007)..... 3, 5

Doe v. Barron, 92 F. Supp. 2d 694 (S.D. Ohio 1999) . 5

Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002)..... 5

Hoover v. Ronwin, 466 U.S. 558 (1984)..... 7

Maher v. Roe, 432 U.S. 464 (1977) 3, 6, 7

Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326 (3d Cir. 1987) .. 4, 5

Roe v. Crawford,
396 F. Supp. 2d 1041 (W.D. Mo. 2005)..... 2

Roe v. Leis,
No. C-1-00-651, 2001 WL 1842459
(S.D. Ohio Jan. 10, 2001)..... 4-5, 5

Turner v. Safley, 482 U.S. 78 (1987) .....*passim*

Victoria W. v. Larpenter,
369 F.3d 475 (5th Cir. 2004)..... 4, 5

OTHER AUTHORITIES

U.S. CONST. amend. XIV, § 1 ..... 2, 5

Sup. Ct. R. 10 2

STATEMENT OF THE CASE

This case arises from the official policy of Defendant Missouri Department of Corrections (MDC) prohibiting pregnant inmates from obtaining medical care for non-therapeutic abortions (the Policy). As recounted in the decisions below, prior to September 2005, "the MDC had a policy of providing transportation outcounts for inmates wanting to terminate their pregnancies." Pet'r App. A2. The inmate herself was responsible for paying the costs of the abortion procedure. Pet'r App. A24. However, in 2005, the MDC altered its policy and determined that "[o]utcounts for elective abortions will no longer be authorized." Pet'r App. A3 (internal quotation marks omitted).[1] As the Eighth Circuit further found, the Policy is not "a specific application of a general policy regarding elective procedures." Pet'r App. A13 n.6. Rather, "abortion is treated differently than other elective procedures." *Id.*

After the MDC repeatedly denied Plaintiff Jane Roe's request for an abortion she sought emergency injunctive relief in federal district court, which issued a preliminary injunction requiring the MDC to transport her to a medical facility outside of

---

[1] The State characterizes the Policy as allowing transports for therapeutic abortions as "determined by physicians exercising their professional judgment on a case-by-case basis." Pet'r Br. 2. However, as the Eighth Circuit explained, under the terms of the Policy, even an abortion indicated due to a threat to a pregnant woman's life or health is only authorized if "approved by the Medical Director in consultation with the Regional Medical Director." Pet'r App. A2 (internal quotation mark omitted). In any event, this case is not about how the Policy applies to women in need of therapeutic abortions, an issue not raised by the plaintiff class, which includes only women seeking non-therapeutic abortions.

the prison. Pet'r App. A1. The State's multiple attempts to stay that preliminary injunction were rejected by the district court, the court of appeals, and this Court. *Roe v. Crawford*, 396 F. Supp. 2d 1041 (W.D. Mo. 2005) (denying stay of Oct. 13, 2005, preliminary injunction), *stay denied*, No. 05-3790 (8th Cir. Oct. 14, 2005), 546 U.S. 959 (2005). Before obtaining the abortion procedure, Roe amended her complaint to seek relief on behalf of a "class consisting of all women in the custody of the MDC who seek elective, nontherapeutic abortions," and the district court certified the class. Pet'r App. A1-2. After completing discovery, the parties each moved for summary judgment. The district court granted declaratory and injunctive relief in favor of the plaintiff class, holding that the Policy violated the Fourteenth Amendment right to choose abortion and the Eighth Amendment right to receive treatment for serious medical needs.

The Eighth Circuit affirmed. It held that the Policy did not violate the Eighth Amendment, but that it was, under *Turner v. Safley*, 482 U.S. 78 (1987), an unreasonable prohibition on Plaintiffs' Fourteenth Amendment rights. Pet'r App. A21.

REASONS FOR DENYING THE WRIT

The Court should decline to review this case because the Eighth Circuit correctly held the Policy unconstitutional under the Fourteenth Amendment, and the State has failed to identify any "compelling reasons" for granting review. *See* Sup. Ct. R. 10. The Eighth Circuit's analysis adheres to the standards established by this Court for reviewing inmates' constitutional claims, *see, e.g., Turner v.*

Safley, 482 U.S. 78 (1987), and applies precisely the same *Turner* standard used by every court to consider policies obstructing incarcerated women's access to abortion care. *See infra* pp. 4-5. Indeed, the absence of a circuit split confirms that this case implicates no unsettled or conflicting standards of law and does not warrant this Court's review.[2] Further, the decision below is wholly consistent with this Court's precedent and does not, as the State contends, conflict with *Maher v. Roe*, 432 U.S. 464 (1977).

First, the State insists, as it did below, that a woman's right to choose abortion does not survive incarceration and, thus, that its Policy prohibiting abortion is simply not subject to constitutional review. Pet'r Br. 5-6. This argument was rightly rejected by the Eighth Circuit as one that "does not withstand analysis." Pet'r App. A6 n.2. Nonetheless, the State continues to advance this proposition in an attempt to create an unsettled question of federal law where none exists. The court of appeals cogently explained the inconsistency between the State's view – that restrictions on incarcerated women's ability to obtain abortion necessarily escape *any* constitutional review – and this Court's precedent:

> Although some rights may be so inherently inconsistent with

[2] Just this term, this Court declined to review a state appellate court decision that applied the same standard. *Doe v. Arpaio*, 150 P.3d 1258 (Ariz. Ct. App. 2007) (applying *Turner* and holding unconstitutional county jail's prohibition on abortion unless inmate first obtained judicial authorization for transport), *cert. denied*, 128 S. Ct. 1704 (2008).

> incarceration, such as the right to travel, that any assertion of the right while in prison would automatically fail, even rights that are, in part, inconsistent with incarceration survive imprisonment, at least enough so that the *Turner* balancing test applies. . . . In [*Turner*], the Supreme Court recognized that "[t]he right to marry, like many other rights, is subject to substantial restrictions as a result of incarceration." [*Turner*, 482 U.S.] at 95, 107 S. Ct. 2254. But, the right to marry does not completely disappear upon imprisonment. *See id.* at 96, 107 S. Ct. 2254. . . . . Logically, this same analysis holds true for access to abortions as well. Certainly, no prisoner could simply elect to leave the institution at will to obtain an abortion. This does not, however, mean any exercise of the right is entirely inconsistent with incarceration, any more than is marriage, or the right to correspond with persons outside of the facility. *See Turner*, 482 U.S. at 91-92, 107 S. Ct. 2254.

Pet'r App. A6 n.2. Indeed, every court to address the issue has recognized that the right to abortion survives incarceration. *See Victoria W. v. Larpenter*, 369 F.3d 475, 483-84 (5th Cir. 2004); *Bryant v. Maffucci*, 923 F.2d 979, 982-85 (2d Cir. 1991); *Monmouth County Corr. Inst'l Inmates v. Lanzaro*, 834 F.2d 326, 334 n.11 (3d Cir. 1987); *Roe v. Leis*, No.

C-1-00-651, 2001 WL 1842459, at *3 (S.D. Ohio Jan. 10, 2001); *Doe v. Barron*, 92 F. Supp. 2d 694, 696 (S.D. Ohio 1999); *Doe v. Arpaio*, 150 P.3d 1258, 1261 (Ariz. Ct. App. 2007).[3]

Similarly, consistent with every other court to review a prison or jail policy restricting abortion access, the Eighth Circuit applied the *Turner* balancing test, under which a prison policy that "impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests," 482 U.S at 89. *See Victoria W.*, 369 F.3d at 483-84 (applying *Turner*); *Monmouth*, 834 F.2d at 338-44 (same); *Roe v. Leis*, 2001 WL 1842459, at *2 (same); *Arpaio*, 150 P.3d at 1262 (same). As an initial matter, the Eighth Circuit emphasized that the MDC's total ban "goes far beyond" the court-order requirements for abortion challenged in the *Victoria W.* and *Monmouth* cases. Pet'r App. A12. As the court of appeals explained: "Once incarcerated in the MDC, an elective abortion, which the Supreme Court determined is a liberty interest protected under the Fourteenth Amendment, is *entirely* unavailable." Pet'r App. A11. Applying *Turner*, the court of appeals then weighed this complete deprivation of plaintiffs' rights against each of the "alternate ways in which the policy

---

[3] *Gerber v. Hickman*, 291 F.3d 617 (9th Cir. 2002), *cert. denied*, 537 U.S. 1039 (2002), cited by the State, Pet'r Br. 6, does not conflict with this uniform consensus. *Gerber* rejected a prisoner's claim that he had a right to procreate by means of providing sperm for artificial insemination while incarcerated. That decision, and the underlying rationale – that "loss of the right to intimate association is simply part and parcel of being imprisoned," 291 F.3d at 621 – does not apply to the right to choose abortion.

purportedly advances security interests." Pet'r App. A8. It concluded that the "MDC policy represents precisely the 'exaggerated response to . . . security objectives' that *Turner* forbids. *Turner*, 482 U.S. at 97-98." Pet'r App. A12-13.[4] The State does not even suggest that the Eighth Circuit was wrong in determining that the Policy is far more restrictive than those reviewed by other courts, or in determining, as did those courts, that the *Turner* standard applies. The State therefore has not identified any unsettled question of law or conflict among the lower courts that warrants this Court's resolution.

Second, the State's assertion that the decision below warrants review because it conflicts with this Court's decision in a Medicaid funding case, *Maher v. Roe*, 432 U.S. 464 (1977), *see* Pet'r Br. 3, is equally untenable.[5] In *Maher*, this Court upheld

---

[4] Security was the only interest the State offered in defense of the Policy in its initial appeal to the Eighth Circuit. *See* Pet'r App. A6-10. The State did not argue that its preference for childbirth over abortion should render the Policy "constitutionally sustainable," or that a contrary conclusion would conflict with *Maher*, Pet'r Br. 4, until filing a petition for rehearing. Because that petition was denied, this argument was never addressed by the Eighth Circuit.

[5] Aside from the fact that the State's reliance on *Maher* is so clearly unfounded, the Court should decline review on this issue for prudential reasons. The State raised *Maher* in its brief opposing plaintiffs' motion for summary judgment in the district court, but then abandoned it on appeal to the Eighth Circuit. It was thus never addressed by the Eighth Circuit even though the State belatedly tried to raise it again in an unsuccessful petition for rehearing. *See supra* n.4. Under these circumstances, this Court should decline to consider it. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970)

Connecticut's decision to pay the costs of childbirth but not abortion for indigent women. In so doing, this Court explained that Connecticut "may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it . . . imposed no restriction on access to abortions that was not already there." 432 U.S. at 474. In short, this Court upheld the regulation because it "place[d] no obstacles absolute or otherwise in the pregnant woman's path to an abortion." *Id.* In contrast, the MDC Policy *does* create an "absolute" obstacle. As the Eighth Circuit found, and the State conceded, the Policy makes non-therapeutic abortion "*entirely* unavailable" to women once they are in the custody of the MDC. Pet'r App. A11. This critical distinction renders insupportable the State's contention that the MDC's Policy is "no different" than the Medicaid regulation upheld in *Maher*, and that the Policy simply advances a state preference for childbirth in a similar fashion, Pet'r Br. 5. Thus, the Eighth Circuit's decision – that the MDC's Policy unconstitutionally bans abortion for incarcerated women – is consistent with *Maher* and with this Court's decisions invalidating state laws that go well beyond discouragement to effectively prohibit abortion. *See Maher*, 432 U.S. at 473-74 (explaining that Connecticut funding regulation was "different in kind from the laws invalidated in our previous abortion decisions," for example those that

---

("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (holding that where respondent raised arguments for the first time in a response to petitioner's motion for rehearing in the court of appeals it was untimely and precluded consideration).

"interposed an absolute obstacle") (internal quotation mark omitted).

CONCLUSION

For the foregoing reasons, the State's petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS M. BLUMENTHAL
Counsel of Record
165 North Meramec Avenue
6th Floor
St. Louis, Missouri 63105
(314) 727-2266
Cooperating Attorney for the ACLU of Eastern Missouri Fund

DIANA KASDAN
TALCOTT CAMP
LOUISE MELLING
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633

ANTHONY E. ROTHERT
ACLU of Eastern Missouri Fund
454 Whittier Avenue
St. Louis, Missouri 63108
(314) 652-3111

June 26, 2008